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Arizona Corporation Commission
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IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH § 271 OF THE TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. T-00000A-97-0238

QWEST'S NOTICE OF SUPPLEMENTAL AUTHORITY REGARDING QWEST'S COMPLIANCE WITH CHECKLIST ITEM 1

Qwest Corporation submits this notice of supplemental authority regarding Qwest's compliance with Checklist Item 1. During the oral argument on ratcheting on February 27, 2002, the Commission expressed interest in further briefing regarding its authority to charge rates different from those in Qwest's federal tariff. This notice of supplemental authority addresses that request.

DISCUSSION

A. This Commission cannot order the modification of a federal tariff.

Qwest provides interstate special access services through federal tariffs filed with the Federal Communication Commission. These tariffs provide the exclusive means by which purchasers of interstate access can use Qwest's services. Neither Qwest, its customers nor state regulators can modify the terms and conditions of these federal tariffs without complying with the specific procedures set forth in the Communications Act. This rule arises in several contexts.

Carter v. AT&T Co., 365 F. 2d 486 (5th Cir 1966), *cert denied*, 385 U.S. 1008 (1967), involved a private antitrust action against AT&T filed under 15 U.S.C. §§ 15 & 22. The antitrust action was closely related to a tariff that AT&T had filed with the FCC. The District Court held that "'primary jurisdiction' is 'vested in the' FCC 'to resolve all questions relating to the justness, reasonableness, validity, and effect of the tariffs and practices complained of,'" *Id.* at 491-92, and referred the matter to the FCC. At the urging of AT&T, the Court of Appeals for the Fifth Circuit affirmed. The court rejected the plaintiffs' argument that "the tariff is initially the handiwork of the Telephone Companies' scriveners." *Id.* at 496. It emphasized that "a tariff, required by law to be filed, is not a mere contract. It is the law." *Id.*

More recently, *AT&T Co. v. Cent. Office Tel.*, 524 U.S. 214 (1998), involved an action brought by a long-distance reseller against AT&T, alleging breach of contract and tortious interference with contract arising from alleged defects in AT&T's provisioning and billing of services. The District Court entered a judgment based on a jury verdict for the reseller, and the Court of Appeals for the Ninth Circuit affirmed in part, but the Supreme Court reversed, holding that the reseller's claims were barred by the filed-tariff doctrine. AT&T had been required to file tariffs with the FCC. Citing a long line of cases, the Supreme Court held that these tariffs preempted plaintiff's claims. As the Court explained, the rate filed is "the only lawful charge" and "[d]eviation from it is not permitted upon any pretext." *Id.* at 422, *quoting Louisville & Nashville R. Col v. Maxwell*, 237 U.S. 94, 97 (1915).

Under the "filed-rate doctrine" (which is not limited to rates),

> the Supreme Court has ruled that where the FERC [Federal Energy Regulatory Commission] has lawfully determined a rate, allocation, or other matter, a state commission cannot take action that contradicts the federal determination. And even without explicit federal approval of a rate, the Court has treated a rate reflected in a FERC tariff as setting a rate level binding on a state commission in regulating the costs of the purchasing utility.

Public Serv. Co. of New Hampshire v. Patch, 167 F.3d 29, 35 (1st Cir. 1998), *citing Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373-74 (1988); *Nantahala Power*

& Light Co. v. Thornburg, 476 U.S. 953, 962-66 (1986); *cf. Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951).

Qwest's interstate tariffs are subject to the sole and exclusive jurisdiction of the FCC. As the court stated in *AT&T Communications of the Mountain States, Inc. v. Public Serv. Comm'n of Wyoming*, 625 F. Supp. 1204, 1208 (D. Wyo. 1985), citing *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133 (1930),

> The *Smith* Court went on to say that the interstate tolls were not a matter for determination by state commissions, but rather were exclusively federal matters.

See also In re AT&T Co. & Associated Bell System Companies Interconnection with Specialized Carriers in Furnishing Interstate Foreign Exchange Service & Common Control Switching Arrangements, 56 FCC 2d 14, 20 (1975), *aff'd, California v. FCC*, 567 F.2d 84 (D.C. Cir 1977). States may take action with respect to interstate services and services in federal tariffs only to the extent permitted by law or, in limited circumstances, by the FCC itself. *See General Communication, Inc. v. Alaska Communications Sys. Holdings, Inc.*, 16 FCC Rcd 2834, 2844 (2001).

Here, as Qwest explains below, its federal tariff is clear and explicit. The tariff cannot be modified by a state commission any more than the FCC can regulate the prices of local exchange services offered by Qwest. Any effort to modify Qwest's federal tariffs must be presented to the FCC, which has sole jurisdiction to modify these tariffs.

B. Qwest's federal tariff governs the shared use of its interstate special access circuit.

Section 2.7 of Qwest Tariff F.C.C. No. 1 covers shared use of an interstate special access circuit. This tariff provides for proportional charges for some shared services, but *only for shared use of federally tariffed services*. For example, Section 2.7 and 2.7.2 provides for proportional pricing when DS1 and DS3 special access service (called PLTS or Private Line

Transport Services in the tariff) is shared with switched access service since both are federally tariffed services.

However, when PLTS is shared with local exchange service, this tariff explicitly prohibits proportional pricing:

> 2.7.1. PLTS with Local Exchange Service
>
> PLTS and Local Exchange Service may be provided on a Shared Use facility. However, individual recurring and nonrecurring charges shall apply for each PLTS and local Exchange Line. The Shared Use facility is not apportioned.

This language is very clear. When a jurisdictionally interstate private line is shared with local exchange service, apportionment is not permitted. As Qwest explains in the next section of this Notice, its tariff provision implements the FCC's prohibition against proportional pricing of interstate and local service. By imposing proportional pricing, this Commission is impermissibly ordering the modification of this federal tariff. Proportional pricing is tantamount to decreasing the rates for a federally tariffed service.

C. Proportional pricing would violate FCC orders.

The proportional pricing ordered by this Commission is prohibited by the FCC's *Supplemental Order Clarification*.[1] The FCC recently explained this prohibition in a proceeding brought by Net2000 Communications against Verizon.[2] The FCC held that Verizon did not violate the Communications Act of 1934 or FCC rules by denying Net2000's requests for the

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[1] Supplemental Order Clarification, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183 ¶22(3) at 13-14 (rel. June 2, 2000) ("*Supplemental Order Clarification*").

[2] Memorandum Opinion and Order, *In the Matter of Net2000 Communications, Inc. v. Verizon – Washington, D.C., Inc.*, File No. EB-00-018, FCC 01-381 (rel. Jan. 9, 2002) ("*Net2000 Communications*").

conversion of certain special access circuits to enhanced extended links ("EELs"). In the course of its opinion, the FCC explained,

> Net2000 argues that whether circuits are used for "a significant amount of local exchange service" and therefore qualify for conversion to EEL should be judged on an "end-user-by-end-user basis." It should not matter, Net2000 contends, whether a dedicated DS1 between the CLEC's office and the customer's premises that is used to provide local exchange service is carried on a multiplexed DS3 transport channel that includes other DS1s used for other services. *It proposes that DS3 circuits derived from both EEL-eligible and non-EEL-eligible DS1 circuits be priced utilizing "ratcheting," similar to mixed use DS3 circuits carrying both special access and switched assess DS1s, so that proportionate unbundled network element rates would apply to the converted DS1s and proportionate special access rates would apply to the non-converted DS1s.* The arguments made by Net2000, however, ignore the specific language of Option 3. *There is no provision anywhere in the Supplemental Order Clarification, or in prior orders for "ratcheting."* The language of Option 3 clearly and specifically requires that "[w]hen a loop-transport combination includes multiplexing (*e.g.*, DS1 multiplexed to DS3 level), each of the individual DS1 circuits must meet [the substantial local exchange service use] criteria." There is no ambiguity in this language. *Although Net2000 argues that it would be better if CLECs were permitted to convert only the parts of their DS3s that are used to provide local exchange service and to continue to obtain the remaining parts of the DS3s by tariff, this clearly is not permitted under our rules.*[3]

Thus, the FCC explicitly rejected proportional pricing, as ordered by this Commission. In the *Net2000 Communications* decision, the FCC rejected Net2000's request for ratcheting and noted that "[t]here is no provision anywhere in the *Supplemental Order Clarification*, or in prior orders for 'ratcheting.'"[4] This Commission should apply the same analysis in this case. No party has identified any FCC order or rule that allows or provides for proportional pricing of local and long-distance traffic. The request for proportional pricing should be rejected.

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[3] *Id.* ¶ 28, at 9-10 (citations omitted) (emphasis added).

[4] *Id.* ¶ 28, at 9.

The commingling prohibition within Option 3 of the FCC's *Supplemental Order Clarification* and its explanation of this prohibition in *Net2000 Communications* are not limited to the conversion of special access circuits to EELs. Although the specific fact scenario presented to the FCC in *Net2000 Communications* involved the conversion of special access circuits to EELs, the application of its holding and the policy that drives it are not limited to those facts. As is plain from the excerpt quoted above, the holding in *Net2000 Communications* prohibits proportional pricing, or "ratcheting," when local and long-distance services are commingled on the same DS3 circuit.

In a related context, the *Supplemental Order Clarification* was very clear that, in affirming the general prohibition against commingling UNEs and ILEC tariffed services, it was not speaking only about EELs:

> We further reject the suggestion that we eliminate the prohibition on "commingling" (i.e. combining *loops or loop-transport combinations* with tariffed special access services) in the local usage options discussed above. We are not persuaded on this record that removing this prohibition would not lead to the use of unbundled network elements by IXCs solely or primarily to bypass special access services.[5]

Commingling, of course, is not an issue in Arizona. Qwest voluntarily agreed in its SGAT that CLECs can commingle local interconnection and exchange access traffic on the same trunk group. The only issue involves the price and specifically whether Qwest must ratchet down its federally-tariffed DS3 channel termination charge to reflect the percentage of trunks within the DS3 line used for interconnection or access to UNEs.

On this issue, both the *Supplemental Order Clarification* and *Net2000 Communications* are clear. They prohibit proportional pricing.

[5] *Supplemental Order Clarification*, ¶ 28 (emphasis supplied, footnote omitted).

CONCLUSION

State commissions are without authority to order modifications to federal tariffs. Only the FCC can order the modification of a federal tariff. This Commission cannot order proportional pricing in the face of a valid Qwest tariff that prohibits such pricing.

DATED this 12th day of March, 2002

Respectfully submitted,

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